

In the Court of Appeals of the State of Alaska

Richard Dorsey,
Appellant,

v.

State of Alaska,
Appellee.

Court of Appeals No. **A-13521**

Order

Date of Order: **March 31, 2020**

Trial Court Case No. **3AN-17-05530CI**

Before: Allard, Chief Judge, and Wollenberg and Harbison, Judges.

Richard Dorsey seeks to appeal an order dismissing his application for post-conviction relief. The superior court's order was distributed by mail on April 9, 2019, so any notice of appeal was due by May 13, 2019.¹ Dorsey did not file his notice of appeal until late September 2019 — more than four months after the deadline.

Dorsey filed a motion to accept his late-filed appeal. This Court denied the motion without prejudice for Dorsey's attorney to renew the motion if the attorney believed that the failure to timely file the appeal was due to attorney neglect.

Dorsey has now renewed his motion. In the renewed motion, Dorsey (now represented by a new attorney) asserts that the attorney who represented him on his post-conviction relief application failed to timely inform him of the superior court's dismissal of the application, and that, as a result, his appeal was not timely filed.

Alaska Appellate Rule 521 authorizes an appellate court to relax or dispense with a rule of appellate procedure — such as a filing deadline — if strict

¹ Alaska R. App. P. 204(a)(1) & 502(a), (c).

adherence to the procedure will work an injustice. But Appellate Rule 521 also declares that “[i]n a matter involving the validity of a criminal conviction or sentence,” the rule “does not authorize an appellate court . . . to allow . . . the notice of appeal to be filed more than 60 days late.”²

We have recognized that the limitation in Appellate Rule 521 cannot be applied to deny a defendant the right to pursue an appeal when the failure to timely file the notice of appeal is due to attorney neglect. Accordingly, this Court has accepted late notices of appeal, even those filed more than 60 days late, when the uncontested facts demonstrated that the delay was caused by ineffective assistance of counsel. *See, e.g., Belluomini v. State*, File No. A-13306 (Order dated Nov. 26, 2018); *Nyako v. State*, File No. A-13157 (Order dated July 16, 2018); *Backford v. State*, File No. A-12995 (Order dated Nov. 22, 2017); *Hoehne v. State*, File No. A-12815 (Order dated Mar. 16, 2017); *Stacy v. State*, File No. A-12668 (Order dated Nov. 1, 2016); *Custer v. State*, File No. A-11901 (Order dated Mar. 28, 2014).

In this case, Dorsey’s former attorney, Megan M. Rowe, asserts that she mailed Dorsey a copy of the court’s dismissal order in April 2019 and spoke with him on the phone over the summer, although she acknowledges that her office staff later misinformed Dorsey that a court ruling was still pending. Dorsey asserts (and prison logs appear to confirm) that he did not receive the order Rowe claims to have sent in

² *See also* Alaska R. App. P. 502(b) (authorizing motions to extend a time period within which an act must be completed, but, in matters “requesting review of or appealing a criminal conviction or sentence,” providing that an appellate court may not validate the filing of a notice of appeal more than 60 days beyond the expiration of the deadline set by rule or pursuant to the last extension of time previously granted).

April, and he states that he did not learn of the dismissal until September 19, 2019. He acknowledges that he called Rowe's office several times over the summer, but he contends that he spoke only to paralegals, who did not inform him of the court's dismissal. He disputes that he spoke with Rowe over the summer.

In the renewed motion, Dorsey's new attorney acknowledges that disagreement exists over whether a phone call with Rowe occurred over the summer. The attorney asks this Court to remand Dorsey's case to the superior court for an evidentiary hearing, rather than a separate post-conviction relief action, to resolve the factual dispute.

We recognize that an evidentiary hearing in an already-existing case may be more streamlined than initiating an entirely new proceeding. But in practice, it is not clear what procedures would govern such a hearing — *e.g.*, whether the parties would be entitled to exchange discovery, whether the trial court would have the authority to grant the requested relief following the evidentiary hearing, and what the appellate remedy for a losing party would be.

We therefore follow the procedure we adopted in *Cleveland v. State/Akeya v. State*, File Nos. A-13181/13182 (Order dated June 14, 2019), and convert the motion to accept late-filed appeal into a post-conviction relief application.

Accordingly, IT IS ORDERED:

1. Referral to the Superior Court. This case is remanded to the superior court with directions to convert the motion to accept late-filed appeal into an application

for post-conviction relief. Because Dorsey seeks to appeal the order dismissing his first post-conviction relief application, Dorsey's new post-conviction relief application is governed by *Grinols v. State*, 10 P.3d 600 (Alaska App. 2000), *aff'd*, 74 P.3d 889 (Alaska 2003) (permitting a criminal defendant to file a second post-conviction relief application challenging the effectiveness of his attorney in his first post-conviction relief application).

We direct the Appellate Clerk's Office to transmit a copy of the file in this case to the superior court.

At Dorsey's request, the superior court shall bifurcate the attorney neglect issue (*i.e.*, whether attorney neglect resulted in the late-filed appeal) from any other post-conviction relief issues that Dorsey may wish to pursue in a *Grinols* application, and the court shall stay litigation on the remaining claims. The court shall expedite action on the attorney neglect claim related to the late-filed appeal.³

2. Additional guidance. Because this application for post-conviction relief needs to be litigated and resolved on an expedited basis, we provide the following additional guidance to the superior court.

Under *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), it is *per se* ineffective assistance of counsel for an attorney to fail to meet the filing deadline for a direct appeal

³ We recognize that action on this expedited claim may be impacted by current court orders prioritizing and suspending certain hearings in response to the COVID-19 pandemic. *See, e.g.*, Special Order of the Chief Justice, Order No. 8131 (March 19, 2020); Presiding Judge Statewide Administrative Order Governing Relaxation and Suspension of Various Court Rules Based on the COVID-19 Pandemic (March 23, 2020). We encourage the parties to confer telephonically or by email to resolve this matter as expeditiously as possible.

if the defendant timely requested an appeal. Because filing a notice of appeal is a “purely ministerial task,” a defendant who instructs counsel to initiate an appeal “reasonably relies upon counsel to file the necessary notice.” *Id.* at 477. The remedy for this *per se* ineffective assistance of counsel is to reinstate the appeal. *Id.* at 484; *see also Broeckel v. State*, 900 P.2d 1205, 1208 (Alaska App. 1995).

In *Wassilie v. State*, 331 P.3d 1285 (Alaska App. 2014), this Court extended this duty — *i.e.*, the obligation to preserve a defendant’s right to appeal — to attorneys who represent a defendant in a post-conviction relief application in the trial court and ultimately file a certificate of no arguable merit as to the defendant’s claims. *See id.* at 1289. Thus, an attorney who is permitted to withdraw after filing a no-merit certificate in a post-conviction relief case “still owes certain final duties to the defendant: the obligation to ascertain whether the defendant wishes to appeal [the court’s dismissal of his application for post-conviction relief] and, if so, the obligation to initiate appellate proceedings.” *Id.* at 1290.

3. Conclusion. Because we are remanding Dorsey’s case with directions to convert his motion into a post-conviction relief application, we direct the Appellate Clerk’s Office to close this file. If the superior court grants relief to Dorsey, he may move to reopen this appeal, or file the necessary paperwork to initiate a new appeal.

Entered at the direction of the Court.

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Clerk of the Appellate Courts

/s/ M. Montgomery

Meredith Montgomery

cc: Court of Appeals Judges
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